Tan Sri G Darshan Singh v Tetuan Azam Lim & Pang

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-567–03 OF 2012
ABDUL WAHAB PATAIL, CLEMENT SKINNER AND AZIAH ALI JJCA
6 JULY 2012

Civil Procedure — Contempt of court — Order for committal — Ex parte leave to commence committal proceeding — Set aside for non-disclosure of material and relevant facts — Appeal against — Whether appellant failed to make full and frank disclosure — Whether trial judge erred in considering facts not disclosed to be material and relevant in setting aside ex parte leave — Whether after having granted leave to apply for order of committal, trial judge ought to have considered merits of committal application — Whether warranted appellate intervention — Rules of the High Court 1980 O 52

The appellant appealed to this court against the decision of the High Court which had dismissed the appellant's notice of motion under O 52 r 3(1) of the Rules of the High Court 1980 ('RHC') (encl 70) to commit the respondent/garnishee ('the garnishee') for contempt of court. The trial judge had allowed the garnishee's application to set aside the ex parte order ('encl 69') pursuant to O 52 r 2(2) granting leave to commence committal proceedings. The appellant asserted, inter alia, that the learned judge erred in law and in fact: (i) in setting aside encl 69 which was the ex parte application of the appellant for leave to commit the respondent; and (ii) in holding that the appellant had failed to make full and transparent disclosure of all relevant and material facts as would enable the court to make a fair and just judicial decision. The appellant submitted that the O 52 statement contained sufficient information as to what the alleged breach was to enable the respondent to meet the allegations against them. Further, the appellant asserted that after having granted the leave to apply for an order of committal in encl 69, the trial judge ought to have considered the merits of the committal application in encl 70.

Held, dismissing the appeal with costs of RM10,000:

(1) Committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards before a party is labelled as an alleged contemnor and committal proceedings allowed to be begun against him. Firstly, even though it is obtained ex parte, the law nevertheless required leave to be obtained to commence committal proceedings. Secondly, strict compliance is required. Thirdly, be it a civil or a criminal contempt, the

standard of proof required is proof beyond reasonable doubt (see para 13); *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 referred.

(2) Since an application for leave to commence committal proceedings is made ex parte, it must necessarily have all the relevant facts to enable the court to make a fair and just decision. The applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemnor in objecting to the application if it were an inter parte application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. It certainly does not mean the applicant was entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily becomes a tool exploited for oppression (see para 15).

(3) The appellant's application was couched in terms that the respondents were holding the sum of money for the first defendant and that the appellant had obtained a judgment against the first defendant. However, the application neglected to mention relevant and material facts, inter alia, as follows: (i) although the first defendant commenced the development project, it had been taken over by the second defendant with the agreement of all the purchasers except the appellant; (ii) that the second defendant had obtained an order under O 18 r 19 to strike out the claim by the appellant against it; (iii) that the sum held by the garnishee is the 5% retention held by the garnishee as stakeholder; and (iv) that the sum held by the garnishee was for the second defendant (see para 10).

(4) The facts and the submissions before this court displayed an unrepentant defence of an ex parte leave obtained to commence committal proceedings without full and transparent disclosure of all relevant and material facts as would enable the court to make a fair and just judicial decision. In the circumstances, the learned judge had not erred in considering the facts not disclosed to be material and relevant and set aside the ex parte leave she had granted earlier. Obviously, the non-disclosure led her to granting leave she would otherwise not have granted (see paras 17–18).

[Bahasa Malaysia summary

Perayu telah merayu ke mahkamah ini terhadap keputusan Mahkamah Tinggi yang telah menolak notis usul perayu di bawah A 52 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') ('lampiran 70') untuk mensabitkan responden/garnisi ('garnisi') kerana menghina mahkamah. Hakim perbicaraan telah membenarkan permohonan garnisi mengetepikan perintah ex parte itu ('lampiran 69') menurut A 52 k 2(2) memberikan kebenaran untuk

memulakan prosiding komital. Perayu menegaskan, antara lain, bahawa hakim yang bijaksana terkhilaf dari segi undang-undang dan fakta: (i) dalam mengetepikan lampiran 69 yang merupakan permohonan ex parte perayu untuk kebenaran untuk mensabitkan responden; dan (ii) dalam memutuskan bahawa perayu telah gagal membuat pendedahan penuh dan telus berhubung semua fakta relevan dan material agar membolehkan mahkamah membuat keputusan kehakiman yang adil dan saksama. Perayu berhujah bahawa penyataan A 52 mengandungi maklumat yang mencukupi berhubung pelanggaran yang dikatakan bagi membolehkan responden memenuhi pengataan terhadap mereka. Selanjutnya, perayu menegaskan bahawa setelah diberikan kebenaran untuk memohon perintah komital dalam lampiran 69, hakim perbicaraan patut mengambil kira merit permohonan komital dalam lampiran 70.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Prosiding komital adalah bersifat jenayah kerana ia melibatkan kebebasan orang yang menghina sebagaimana dikatakan itu. Berdasarkan itu, undang-undang telah memperuntukkan prosedur-prosedur perlindungan sebelum suatu pihak dilabel sebagai orang yang menghina sebagaimana dikatakan itu dan prosiding komital dibenarkan untuk dimulakan terhadapnya. Pertama, meskipun ia diperoleh secara ex parte, undang-undang masih menghendaki kebenaran diperoleh untuk memulakan prosiding komital. Kedua, pematuhan ketat adalah perlu. Ketiga, walaupun penghinaan sivil atau jenayah, piawai bukti yang dikehendaki adalah bukti melampaui keraguan munasabah (lihat perenggan 13); *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458 dirujuk.

(2) Oleh kerana permohonan untuk kebenaran memulakan prosiding komital dibuat ex parte, ia perlu mempunyai semua fakta relevan bagi membolehkan mahkamah membuat keputusan yang adil dan saksama. Pemohon hendaklah menyatakan fakta dengan adil, termasuklah fakta yang berkemungkinan akan ditimbulkan oleh orang yang menghina yang dikatakan itu yang dicadangkan dalam membantah permohonan tersebut jika ia adalah permohonan inter parte. Jika mana-mana fakta berkemungkinan untuk dipertikaikan oleh pihak lain, pemohon perlu menyatakan begitu dan memberikan sebab-sebabnya kenapa pertikaian sedemikian tidak boleh dikekalkan, atau tidak relevan atau tidak material. Semestinya ia tidak bermaksud bahawa perayu berhak hanya untuk menyatakan fakta yang menyebelahi permohonannya dan mahkamah perlu bergantung kepadanya sahaja. Jika tidak prosedur kebenaran bukan lagi suatu perlindungan dan sebaliknya dengan mudah menjadi alat yang dieksploitasikan untuk penindasan (lihat perenggan 15).

(3) Permohonan perayu diungkap dalam terma bahawa responden-responden memegang jumlah wang untuk defendan pertama dan bahawa perayu telah memperoleh penghakiman terhadap defendan pertama. Walau bagaimanapun, permohonan itu gagal menyatakan fakta relevan dan material, antara lain, seperti berikut: (i) meskipun defendan pertama telah memulakan projek pembangunan, ia telah diambil alih oleh defendan kedua dengan persetujuan semua pembeli kecuali perayu; (ii) bahawa defendan kedua telah memperoleh perintah di bawah A 18 k 19 untuk membatalkan tuntutan oleh perayu terhadapnya; (iii) bahawa jumlah yang dipegang oleh garnisi adalah penyimpanan 5% yang dipegang oleh garnisi sebagai pemegang kepentingan; dan (iv) bahawa jumlah yang dipegang oleh garnisi adalah untuk defendan kedua (lihat perenggan 10).

(4) Fakta dan hujah di hadapan mahkamah ini menunjukkan pembelaan untuk kebenaran ex parte yang diperoleh untuk memulakan prosiding komital tanpa pendedahan penuh dan telus tentang semua fakta relevan dan material yang membolehkan mahkamah membuat keputusan kehakiman yang adil dan saksama. Dalam keadaan berikut, hakim yang bijaksana tidak terkhilaf dalam mengambil kira fakta yang tidak dikemukakan sebagai material dan relevan dan mengetepikan kebenaran ex parte yang telah diberikan beliau sebelum ini. Adalah jelas, ketidakdedahan itu telah menyebabkan beliau memberikan kebenaran yang mana mungkin sebaliknya (lihat perenggan 17–18).]

Notes

For cases on order of committal, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2102–2104.

Cases referred to

Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors [2012] 3 MLJ 458; [2012] 2 CLJ 849, FC (refd)

Legislation referred to

Housing Development (Control and Licensing) Act 1966 s 7A(7)
Rules of the High Court 1980 O 18 r 19, O 49 rr 5, 6(1), O 52, O 52 rr 2(2), 3(1)

Appeal from: Civil Suit No S6–22–1040 of 2007 (High Court, Kuala Lumpur)

Harpal Singh (Navinder Singh with him) (Darshan, Syed, Amarjit & Partners) for the appellant/plaintiff.
M Pathmanathan (Foo Joon Liang and Shirin Pathmanathan with him) (Gan Partnership) for the respondent/garnishee.

Abdul Wahab Patail JCA:

[1] The appellant Tan Sri Darshan Singh appealed to this court against the decision of the High Court on 10 February 2012 where that court:

(a) dismissed the appellant's notice of motion under O 52 r 3(1) of the Rules of the High Court 1980 at encl 70 to commit the respondent/garnishee ('the garnishee') for contempt of court; and

(b) allowed the garnishee's application at encl 73 to set aside the ex parte order at encl 69 pursuant to O 52 r 2(2) made on 23 November 2011 granting leave to commence committal proceedings.

THE MEMORANDUM OF APPEAL

[2] In his memorandum of appeal, the appellant asserted that the learned judge erred in law and in fact as follows:

(a) in setting aside encl 69 which is the ex parte application of the appellant for leave to commit the respondent;

(b) in holding that the plaintiff had failed to make full and frank disclosures;

(c) when after having granted the leave to apply for an order of committal in encl 69, ought to have considered the merits of the committal application in encl 70 (interparte notice of committal);

(d) in failing to consider:

(i) that the respondent had, by affidavit sworn by Lim Chong Leong on 5 December 2008, confirmed that a sum of RM703,160.30 was held by the respondent as stakeholder sum;

(ii) the letter from the Ministry of Housing and Local Government dated 8 December 2011 that confirms all the stakeholder sums pertaining to the said first judgment debtor as the developer for the said housing project;

(iii) that the respondent had released the stakeholder sums to the second judgment debtor after the appellant had served the garnishment order to show cause dated 9 September 2008 ('the said garnishment order') on the respondent;

(iv) the respondent's letter dated 13 May 2011 which confirms the stand taken by the respondent in releasing the stakeholder sums to the second judgment debtor;

(v) that the respondent ought to have retained sufficient sum out of the garnishment sum to satisfy the appellant's judgment dated 24 January 2008;

(vi) that the second judgment debtor had filed an intervener application dated 28 October 2008 to intervene in the garnishee proceedings and which the second judgment debtor later withdrew the said application after receiving the stakeholder sums from the respondent and before the conclusion of the garnishee proceedings; and

(vii) that the respondent ought to have sought the directions of the court pursuant to O 49 rr 5 and 6(1) of the Rules of the High Court 1980 and in the garnishment proceedings itself before releasing the garnishment sum to the second judgment debtor who had already filed an intervener application against the garnishment sum;

(e) in considering irrelevant facts and failing to consider relevant facts.

THE SUBMISSIONS FOR THE APPELLANT

[3] The written submission for the appellant began with a brief introduction and then proceeded to merits of the appeal, principles of appellate interference, background facts, nature of encl 70, reasons why the appeal should be allowed before proceeding to conclusions where it was submitted:

> (35.) It is respectfully submitted that the Appellant had made full and frank disclosure as the Order 52 Statement contained sufficient information as to what the alleged breach was to enable the respondent to meet the allegations against it.
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> (36.) … it is pertinent to note that in *Chandra Sri Ram v Murray Hiebert* [1997] 3 MLJ 240 at p 253 para G (TAB-14) the Court held:- Further, the Court went on to adopt Lord Woolf MR's judgment in *Nicholls v Nicholls* [1997] 147 NLJ 61 …
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> (37.) Based on the above, it is therefore respectfully submitted that the Learned Judge erred in law and fact in dismissing the Ex-Parte Order for leave to commit the respondent at the hearing of Enclosure 70.
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> (38.) By reason of the matters submitted above, the Appellant respectfully pray that the Appeal be allowed with costs.

[4] It is obvious that the appeal in respect of the dismissal of the appellant's notice of motion need to be considered only if the appellant's appeal against the setting aside of the 23 November 2011 ex parte order is allowed.

[5] On 31 May 2012, Dato' Harpal Singh Grewal began quite properly before us to deal with setting aside of the ex parte order first.

REASONING AND CONCLUSION

[6] The learned judge, who sat in the court that granted the ex parte leave, heard the inter parte application by the alleged contemnor to set aside the ex parte leave. She set out her grounds concisely as follows:

> 2. Having heard the parties and having perused the cause papers and written submission of the parties I find that the plaintiff has failed to make full and frank disclosures. The stakeholder sum is not a debt due to the first defendant that can be garnished by the plaintiff. The stakeholder sum is not a sum 'due or accruing due' to the first defendant.
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> 3. The plaintiff has failed to prove its allegation set out in the O 52 statement beyond a reasonable doubt.

[7] The language is not strictly confined to the purposes of the application to set aside the ex parte order because, as para 3 shows, the judgment dealt with the appellant's notice of motion to commit the garnishee also. It is clear however in para 2 that the court would not have granted the ex parte leave if the facts not disclosed by the appellant but subsequently put before the learned judge, had been disclosed by the appellant earlier.

[8] We examined the grant of leave to commence committal proceedings to see if the learned judge was right to do so.

[9] The appellant's application was couched in terms that the respondents were holding the sum of money for the first defendant and that the appellant as plaintiff had obtained a judgment against the first defendant.

[10] The application neglected to mention that:

(a) although the first defendant commenced the development project, it had been taken over, with the agreement of all the purchasers except the appellant, by the second defendant;

(b) the appellant had sued the first and the second defendant;

(c) the second defendant had taken over the failed development from the first defendant;

(d) the second defendant had obtained an order under O 18 r 19 to strike out the claim by the appellant against it;

(e) the sum held by garnishee is the 5% retention held by the garnishee as stakeholder; and

(f) the sum held by garnishee was for the second defendant.

[11] These facts are relevant and material for the principal reasons that:

(a) under s 7A(7) of the Housing Development (Control and Licensing) Act 1966 Act 118 which provides that such monies held by the stakeholder shall not be garnished until all liabilities and obligations of the licensed housing developer under the sale and purchase agreements in respect of the housing development have been fully discharged and fulfilled; and

(b) the monies were held by the garnishee as stakeholder to be returned, not to the first defendant, but to the second defendant in the event no claims are made or there remained a balance.

[12] Order 52 r 2(2) provides that an application for leave to commence committal proceedings must be made ex parte to the court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[13] It has been held by the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors* [2012] 3 MLJ 458; [2012] 2 CLJ 849 (FC) that it is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards before a party is labelled as an alleged contemnor and committal proceedings allowed to be begun against him. Firstly, even though it is obtained ex parte, the law nevertheless required leave tobe obtained to commence committal proceedings. Secondly, strict compliance is required. Thirdly, be it a civil or a criminal contempt, the standard of proof required is proof beyond reasonable doubt.

[14] Strict compliance not only means that the applicant is bound by the mandatory statement under O 52 r 2(2), but it was also held in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong & Ors* that:

> [36] The safeguards in r 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.
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> [37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularized in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemner must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang*'s case. (See also *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112; [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16).

[15] It must also be borne in mind that the application for leave to commence committal proceedings is made ex parte. To enable the court to make a fair and just decision, it must necessarily have all the relevant facts before it. In an ex parte application, it means the applicant must set out the facts fairly, including the facts that are likely to be raised by the proposed alleged contemner in objecting to the application if it were an interparte application. If any fact is likely disputed by the other party, the applicant must say so and give his reasons why such dispute is not sustainable, or is irrelevant or immaterial. There is no reason not to be able to do so for after all only the applicant has the opportunity to be heard upon it in the ex parte application. It certainly does not mean the applicant is entitled to merely state the facts favouring his application and the court must rely on that alone. Otherwise the leave procedure would cease to be a safeguard and instead easily becomes a tool exploited for oppression.

[16] Dato' Harpal Singh Grewal submitted all these are irrelevant for the fact remains that notwithstanding that the order was issued by the court on 9 September 2008, the respondent/garnishee ignored that order and released the money to the second defendant on 13 September 2008. We do not agree. It is effectively a submission that never mind how the leave was obtained, and how misled the court was as to the basis upon which leave to commence committal proceedings was granted, the committal proceedings must be allowed to be proceeded with against the respondent/garnishee for releasing the moneys to the second defendant. The argument is without any merit. Any question whether the ex parte leave to commence committal proceedings was wrongly obtained must be dealt with first since it is the foundation in the process of

committal proceedings. Two wrongs do not make a right. A court of law will not lightly allow its processes to be abused. If the process of the court was wrongly used to obtain the ex parte order for leave, that leave will be set aside first.

[17] The facts and the submissions before this court display an unrepentant defence of an ex parte leave obtained to commence committal proceedings without full and transparent disclosure of all relevant and material facts as would enable the court to make a fair and just judicial decision. The evidence shows the appellant to be a purchaser:

(a) from the first defendant who was unable to complete the building development;

(b) who, unlike other purchasers, refused;

  (i) to forgo his claim to liquidated and ascertained damages against the first defendant, and

  (ii) to sign the tri-partite agreement with the first and second defendants; and in

(c) having refused to recognise the second defendant who completed the development; and

(d) maintaining his claim, obtained judgment against the first defendant as judgment debtor; now

(e) seeks payment, after setting off final payments, from the respondent/garnishee who was holding the money as stakeholder not for the said judgment debtor but for the second defendant.

[18] In the circumstances, we find that the learned judge had not erred in considering the facts not disclosed to be material and relevant and set aside the ex parte leave she had granted earlier. Obviously, the non-disclosure led her to granting leave she would otherwise not have granted. She displayed considerable discretion in keeping her judgment to four short paragraphs when she could have said much more.

[19] Accordingly, we dismissed the appeal in respect of the setting aside of leave to commence committal proceedings. With that the appeal against dismissal of the appellant's application to commit the respondent/garnishee for contempt necessarily fails. We dismissed that appeal also. We fixed costs in the lump sum of RM10,000. We ordered the deposit be refunded so that the

respondent may receive a lump sum payment of costs from the appellant without having to expend further time and effort to collect the deposit towards account of costs.

Appeal dismissed with costs of RM10,000.

Reported by Ashgar Ali Ali Mohamed